IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

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## No. 490

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UNITED STATES OF AMERICA,

Appellant

*versus*

COTTON VALLEY OPERATORS' COMMITTEE, ET AL.

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On Appeal From the United States District Court for the Western District of Louisiana, Shreveport Division.

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**MOTION TO DISMISS OR AFFIRM.**

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Now comes THE OHIO OIL COMPANY, appellee, herein appearing through its undersigned counsel, and moves this Court to dismiss the appeal taken herein upon the following grounds:

1. The Order for Dismissal of this cause,

from which this appeal is prosecuted, was based solely upon the refusal of the government to submit certain reports of investigations, letters, telegrams, etc. (discovery of which was sought by defendants under Rule 34, Rules of Civil Procedure) to the Trial Judge for his determination of the government's claim of "privilege" in respect thereto (*R. 218* et seq.);

2. The specific ground for the dismissal of the action (as such) is not assigned as error in the assignment of errors filed herein *(R. 222)* or included in the statement of points to be relied upon *(R. 266)* and, consequently (pursuant to the provisions of Section 9 of Rule 13 of this Court) will not be considered; and

3. The appellant, having failed to assign as error the specific and only ground upon which the judgment appealed from was based, has failed to effectually comply with Rule No. 9 of this Court, and the sole ground for dismissal not being presented, this appeal should be dismissed.

In the alternative, appellee moves this Court to affirm and for reason therefor shows:

4. Should the assignment of errors herein *(R. 222 and 223)*, the substance of which is set

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forth in assignments Nos. 1 and 2 thereof[1], be construed as properly presenting the contention asserted by the government in the Court below, as set forth in the affidavit attached to its Motion to Vacate the order allowing qualified discovery:

> " * * that it is exclusively within the exercise of the judgment of the Attorney General to determine whether or not the reports and correspondence sought to be examined are privileged; that this prerogative derives from the Constitution of the United States and is in no way affected or changed by the Rules of Civil Procedure Relating to Discovery, particularly Rule 34; that under the authority of R. S. 161 (5 U. S. C. A. 22) (a copy of which is attached hereto and made a part hereof as Exhibit A) the heads of the

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1/ Assignment 1. "The court erred in dismissing the complaint for the failure of plaintiff to produce for inspection reports of the Federal Bureau of Investigation during the period from February 1, 1946 to June 17, 1947 and all correspondence of the Department of Justice during the Period from August 1, 1945 to June 17, 1947, relating to the subject matter of this action.

Assignment 2. "The court erred in granting defendants' motion for the production of the aforesaid documents, as more particularly set forth in said motion, notwithstanding the affidavits of the Attorney General that these documents are privileged and confidential in the public interest."

Assignments Nos. 3 and 4 merely divide the import of assignment No. 2 to cause the same to apply separately to the F. B. I. reports sought and then to letters, telegrams, etc., and assignment No. 5 merely recites the asserted legal sources of the position assumed in that assignment.

Assignment No 6 is that "The Court erred in granting defendants' motion for the production of aforesaid documents in that they were not designated, nor was good cause shown, as required by Rule 34, Federal Rules of Civil Procedure." but the point was not passed upon in the Court below and, consequently, no question relating thereto is now before the Court. **Missouri Pacific Railway Company v. Fitzgerald, 160 U. S. 556; 40 L. Ed. 536.**

> Executive Departments of the Government are authorized to determine which documents of their departments are to be considered confidential and not subject to disclosure;" *(R. 163)*

then, —

5. The question upon which that contention depends is so wanting in substance as not to need further argument, for:

(a) The Constitution does not provide for a complete separation of the powers of the several branches of the government.

*Ex parte Grossman, 267 U. S. 87;*

(b) The assertion of immunity of a department of the executive branch of the government from rules of procedure of the court to which it has resorted for judicial relief is not supported by the provisions of R. S. 161, which does not purport to grant any such immunity[2] and is in conflict with settled precedent by which it has been established that a sovereign power by voluntarily appearing in the role of suitor abandons its immunity from suit and subjects itself to the procedure (and rules of decision) governing the forum which it has sought.

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2/ "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it (R. S. §161.)" **5 U. S. C. A. §22.**

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*Guaranty Trust Company of New York v. United States of America, 304 U. S. 126;*

*United States v. The Thekla, 266 U. S. 328, 340, 341;*

*United States v. Stinson, 197 U. S., 200, 205;*

and

(c) All claim to the asserted immunity or privilege was certainly without merit whatever when counsel for the government herein (an employee of the Department of Justice) appeared in the Court with the documents sought to be reached in his possession and there, after being questioned with regard thereto[3], refused to submit those documents to the Court for determination as to their materiality to the case and whether in the best public interest the information should be disclosed when that procedure was then expressly provided for by Supplement No. 2 to Order 3229, promulgated by the Attorney General on June 6, 1947, and still in effect subsequent to May 5, 1949:

> "If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed."

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3/ R. 207, 208 and 217.

(See certified copy of Order No. 3229 as supplemented attached hereto.)[4]

*United States of America ex rel Touhy v. Joseph E. Ragen, No. 9916 on the docket of the U. S. Court of Appeals for the Seventh Circuit* (decision rendered February 24, 1950, not yet reported).

WHEREFORE, appellee respectfully submits this statement showing that the questions upon which the decision of this case depends are so unsubstantial as not to need further argument; and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the decree of the United States District Court for the Western District of Louisiana.

Respectfully submitted,

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4/ For some reason Supplement No. 2 to Order No. 3229 promulgated by the Attorney General was not filed by plaintiff (R. 164-165).

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# Unites States of America

## Department of Justice

March 9, 1950

Pursuant to Title 28, Section 1733, U. S. Code (Public Law 773, 80th Congress), I hereby certify that the annexed paper is a true copy of the original record in this Department, of Order No. 3229 dated May 2, 1939; Circular No. 3229, Supplement No. 1, dated December 8, 1942; and Order No. 3229, Supplement No. 2, dated June 6, 1947; Circular No. 3259, dated June 14, 1939; and Circular No. 3260, dated June 24, 1939.

SEAL

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

PETER CAMPBELL BROWN,

The Assistant to the Attorney General

A. R. C.

U. S. Government
Printing Office
16-21703

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

May 2, 1939.

ORDER NO. 3229

Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, Section 22), it is hereby ordered:

All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation.

FRANK MURPHY
Attorney General.

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DEPARTMENT OF JUSTICE

Washington, D. C.

December 8, 1942

CIRCULAR NO. 3229

Supplement No. 1

TO UNITED STATES ATTORNEYS AND MARSHALS:

It has been called to my attention from time to time by several United States Attorneys that Officers in the Provost Marshal Branch have requested information from United States Attorneys about suspected or established incendiarism or other sabotage of war material, war premises and war utilities, including the disposition of such cases.

In that connection I wish to call to your attention the Department of Justice Order No. 3229 dated May 2, 1939 which reads in part:

"All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the At-

torney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him."

All such inquiries should, therefore, be referred to this office. It is the earnest desire of the Department of Justice to cooperate as fully as possible with the Armed Forces. However, offices of the United States Attorneys do not ordinarily compile such statistics as are here requested. This is primarily the responsibility of the Federal Bureau of Investigation. Please explain courteously to the various Officers making such requests that the Federal Bureau of Investigation transmits to G2 (Military Intelligence) exhaustive statistics on such cases. The information available to Military Intelligence is kept current daily by the Federal Bureau of Investigation. Inquiry by Officers of the Provost Marshal Branch should, therefore, be made to the War Department in Washington.

Please refer all inquiries of a similar nature to the office of The Assistant to the Attorney General in order that a uniform policy may be worked out. This office will make every effort to furnish the necessary information to the War Department.

JAMES ROWE, JR.

The Assistant to the Attorney General.

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DEPARTMENT OF JUSTICE

Washington 25, D. C.

June 6, 1947.

ORDER NO. 3229

Supplement No. 2

TO ALL UNITED STATES ATTORNEYS
PROCEDURE TO BE FOLLOWED UPON RECEIVING A SUBPOENA DUCES TECUM

Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, records or information he should at once inform his superior officer of the requirement of the subpoena and ask for instructions from the Attorney General. If, in the opinion of the Attorney General, circumstances or conditions make it necessary to decline in the interest of public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with instructions of the Attorney General in refusing to produce the records. The officer or employee should bring with him a certified copy of Order No. 3229, prohibiting the unauthorized disclosure of official records, since the court does not take judicial notice of an intra-departmental order of this sort which is not published. The United States Attorney should be informed of the exact time of the subpoenaed person's appearance in court and be notified at once if there is any difficulty about persuading the court to accept the cer-

tified copy of the order as an answer to the demand to produce the records.

It is important that there should be no appearance of arbitrary refusal to comply with the subpoena and that every respect should be paid to the court's order. Therefore, the officer or employee should, unless directed to the contrary by the Attorney General, bring with him the records and documents which are called for by the subpoena even though the Department takes the position that it is not necessary to produce them. Thus, a subpoena is complied with, although a reason is offered for not actually submitting the documents requested.

It is not necessary to produce the original documents; copies of official records, removal of which from the Department's own files would cause great inconvenience, are acceptable in response to a subpoena. If a subpoena is so vague and general in its terms that it would require the production of all the files with relation to a given matter, there should be a request for a more specific statement as to what is required. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order No. 3229) and explaining that he is not permitted to show the files. If questioned, the officer or employee should state that the material is at hand and can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe-keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

TOM C. CLARK
Attorney General.

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DEPARTMENT OF JUSTICE
Office of the Assistant to the Attorney General
WASHINGTON

June 14, 1939.

CIRCULAR NO. 3259
Re: Order No. 3229
of May 2, 1939.

In view of the fact that a considerable number of inquiries have been received in respect to the purpose and the application of Order No. 3229 of May 2, 1939, attention is invited to the fact that the principal purpose of the Order was to put in written form the practice that had informally existed in the Department of Justice for a great many years. It was not intended to change preexisting usage or to make inaccessible any information that has theretofore been furnished to the public, to the newspapers, or to other officials of the Government.

The formal regulation contained in the Order is based on the decision of the Supreme Court in *Boske* v. *Commingore*, 177 U. S. 459, which relates to subpoenas *duces tecum* for the production of Government documents. The Order does not apply to clerks of United States courts, or to United States Commissioners, since such officials are not attached to the executive branch of the Government, but constitute a part of the personnel of the judiciary. The order is applicable solely to the personnel of the Department of Justice as such, which includes the officials and employees of the seat of Government, the United States Attorneys and their staffs, the offices of the Federal Bureau of Investigation, the United States Marshals and their staffs, and the Federal penal and correctional institutions.

MATTHEW F. McGUIRE,
Acting Assistant to the Attorney General.

DEPARTMENT OF JUSTICE

Office of the Assistant to the Attorney General

Washington

June 24, 1939

CIRCULAR NO. 3260

Referring to Order No. 3229 of the Attorney General concerning the disclosure of official files, documents, records, and information in the custody or control of any officer or employee of the Department of Justice, the following will apply in suits against the United States involving contracts of war risk term and United States Government life insurance.

United States Attorneys and attorneys representing the Bureau of War Risk Litigation may disclose to the plaintiff or his attorney the following records which have been held to be admissable in evidence:

1. The military and medical records pertaining to the insured, which are furnished by the War and Navy Departments, except such portions as are privileged under Section 11 of the Selective Service Regulations.

2. Applications for insurance, applications for reinstatement, and conversion, and information as to lapse or present status of insurance; also as to premium deductions made during service.

3. Claims for insurance benefits and denials there-

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of by the Veterans Administration, its representatives or agencies.

4. Reports of examinations by Government physicians, names and addresses of such physicians, and information as to hospitalization of the insured in Government hospitals.

5. Information as to compensation or other benefits paid on behalf of the insured.

Should any question arise as to the disclosure of other information or records contained in the files, attorneys will decline to make such disclosure unless authorized by the Director of the Bureau of War Risk Litigation.

MATTHEW F. McGUIRE

Acting Assistant to the Attorney General